



BEFORE APPELLATE BENCH NO.II

In the matter of

Application for restoration of Appeal No.2 of 2003

Mr. Muhammad Ahmed Ismail & others.....Applicants

Versus

Commissioner (SCD) SECRespondent

Date of hearing of application - April 27, 2005

Present:

Mr. Umer Lakhani, Advocate for the Applicants

Mr. Ikram-Ul-Haq, Joint Director and Mr. Muhammad Afzal, Joint Director for the Respondent



ORDER

1. This order will dispose off the application under Rule 13(1) of the Securities & Exchange Commission of Pakistan (Appellate Bench Procedure) Rules 2003, ('Appellate Bench Rules ') for restoration of appeal No. 2 of 2003 which was dismissed by the Appellate Bench for non-prosecution on 22-04-2003. The appeal had been filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 ('Act') by the applicants against the order dated 26-12-2002 passed by Commissioner (Specialized Companies). After the dismissal of the appeal, the applicants filed a suit for Declaration and Permanent Injunction before the Sindh High Court against inter alia, the Commission and the Appellate Bench. Subsequently, they also filed an appeal under section 34 of the Act before the Hon'ble High Court against the decision of the Appellate Bench dated 22-04-2003. The above appeal was withdrawn by the applicants on 25-05-2004 however the suit is still pending before the Sindh High Court.

2. A hearing in the instant application was initially fixed by the Appellate Bench on 12-04-2005 however a request for adjournment was received on behalf of the applicants. The matter was adjourned and re-fixed on 19-04-2005 but one day before the hearing another request for adjournment of the case was received. It was stated that the counsel for the applicants was appearing before the Hon'ble Supreme Court on 27-04-2005 and the hearing in the instant application may be fixed on the same day at 3:30 pm, as it would be convenient for their counsel to appear on the said date and time. This request was also accepted and the hearing was fixed on the date and time desired by the applicants. On the date of hearing Mr. Umer Lakhani Advocate appeared on behalf of the applicants.



3. The applicants have also filed an application for condonation of delay in filing the application for restoration of appeal. Arguing on the issue of delay, Mr. Lakhani stated that the application for condonation has been filed without prejudice and on the advice of the Appellate Bench Registry as the applicants believe that no delay has been caused in filing the application for restoration. Mr. Lakhani contended that the High Court while allowing the applicants to withdraw their appeal under section 34 of the Act had ordered them to file the instant application for recall of the order of the Appellate Bench. He stated that no period has been prescribed in the Appellate Bench Rules for filing an application for restoration. Therefore, the Limitation Act, 1908 being the general law would apply in the instant case. He referred to Article 181 of the Limitation Act under which a period of 3 years, from the date when the right to apply accrues, has been prescribed for an application for which no period has been provided elsewhere in the Limitation Act. He argued that the right of the applicants to apply for restoration accrued on 25-05-2004 when the appeal filed by the applicants under section 34 of the Act was withdrawn from the High Court. He stated that Article 163 of the Limitation Act would not apply since, firstly, the said Article only applies to suits and secondly, the order of dismissal of appeal for non-prosecution passed by the Appellate Bench was a void order. He further contended that Article 168 also did not apply since it applied only to appeals dismissed under the Code of Civil Procedure, 1908. He argued that Sub-Rule (1) of Rule 13 of the Appellate Bench Rules requires that the appeal can only be dismissed if the appellant does not appear when the appeal is called on for hearing. The appeal can only be called on for hearing when the Appellate Bench is ready and waiting to hear the appeal. Since no call was made the appeal could not have been dismissed and the order was therefore void. He stated that Mr. Asad Ahmed, who was appellant No.6 in the appeal, along with Mr. Abid Zuberi Advocate had arrived together for the hearing on 22-04-2003 at 3p.m (the date and time of hearing of appeal). He stated that Mr. Asad Ahmed had made an entry in his name at 3p.m. in the visitors register at the office reception on 22-04-2003, which proved their presence at the time of



appeal. Since the applicants were present for the hearing, the appeal should not have been dismissed. He prayed that the appeal may be restored and decided on its merits.

4. Mr. Ikram-Ul-Haq appearing on behalf of the Specialized Companies Division agreed with Mr. Lakhani that where the special law does not specifically provide for something, the principles of general law apply. He argued that Article 168 of the Limitation Act specifically provides for a limitation period for an application for the readmission of an appeal which has been dismissed for want of prosecution. Since the matter under consideration was also an application for the readmission of an appeal, which has been dismissed for non prosecution, it was clear that no other Article could be made applicable. He stated that in any case, the principles of laches would apply to the instant case as the applicants do not seem to be interested in pursuing the case. He stated that the period of limitation begins from the date of dismissal of appeal and not the date of order of High Court. He stated that the High Court had not ordered the applicants to file an application for restoration of appeal as was clear from the order dated 25-05-2004. He argued that the order of the Appellate Bench dismissing the appeal was not void as the applicants had failed to appear on the date and time of appeal specially fixed on the request of the applicants. He rebutted the contention of Mr. Lakhani that the applicants were present at the time of appeal at 3p.m. He produced before us copy of the entries in the visitors register on 22-04-2003. The entry made by Mr. Asad Ahmed in his own hand was at serial No.51, and the time written there was exactly 3p.m. However, the preceding entry No.50 was at 3:57p.m., and the one before that at serial No.49 was at 3:40p.m. Even entries No.46, 47 and 48 were well after 3p.m. Equally, the entry at serial No.52 after Mr. Asad Ahmed's entry gave the time as 4:30p.m. This, he argued, proved that the applicants had actually arrived between 4p.m. and 4:30p.m. and were not present at the time of appeal. Further, it proved that the applicants had in fact lied on oath to the Bench as well the High Court in the suit for Declaration. He



further argued that the applicants were already before the High Court in the suit for Declaration in which they have alleged malafide against the Appellate Bench for dismissing the appeal for non-prosecution. Since the matter against the Appellate Bench was sub judice before the High Court on the same facts, it would not be appropriate to restore the appeal at this stage.

5. In his reply, Mr. Lakhani contended that the copy of the visitors register produced by the Department was the Commission's document and therefore its authenticity could be questioned. He further stated that the principles of laches applied only to proceedings under equity or constitution.

6. We have heard the parties in detail. On the issue of limitation we do not agree with the counsel for the applicants that Article 181 of the Limitation Act would apply to the instant application. There is a clear and sufficient delay in filing the application for restoration of appeal, the reasons for which delay have not been explained by the counsel. The proceedings before the Commission and the Appellate Bench are in the form of summary proceedings and the Appellate Bench is required under the Appellate Bench Rules to decide the appeal, as far as possible, within 45 days of its filing. To argue that the appellants would have 3 years to file an application for restoration of an appeal which was dismissed for non prosecution would defeat the intent and purpose of law. If the Appellate Bench is to take guidance from the law of limitation as both parties have argued, it is clear that it would be from Article 168 which deals specifically with the instant matter. Guidance can further be taken from the principle of laches as the conduct of the applicants has throughout been non-serious. This is entirely the reason why the appeal was dismissed for non-prosecution. Of course the law does not help a person who is not vigilant of his own right. The applicants have taken more than 20 months to apply for restoration of the appeal. The counsel's contention that the right to apply for restoration accrued on the date of withdrawal of appeal from the High Court filed



under section 34 of the Act i.e. 25-05-2004 is untenable. Their right accrued on the date of order of dismissal of appeal by the Appellate Bench on 22-04-2003. Nonetheless, even after the order of the High Court on 25-05-2004 it took them 7 months to apply for restoration. Clearly, this points to a non-serious attitude of the applicants. Or maybe since they have been ordered to pay certain fine for alleged contraventions in the impugned order, they are playing hide and seek and wasting the time of the authorities.

7. The applicant's arguments that the order passed by the Appellate Bench is a void order as the appeal was not 'called on' for hearing is absurd. The Appellate Bench does not function like ordinary courts where calls are made for the parties. The appeals before it are specially fixed on dates and exact time. The applicants are well aware of this fact as they have on numerous occasions requested for not just specific dates but exact time of hearing, which were granted to them. Even on the date when the appeal was dismissed by the Bench, the date and exact time had been fixed on the request of the applicants. However, more disturbing is the fact that the applicants have made false entries at the visitors register and lied on oath before the High Court to allege malafide against the Bench. When confronted with the evidence, Mr. Lakhani's insinuation that the Commission may have tampered with the register is contemptible. The applicants have themselves relied on the entry made by them in the register and cannot be allowed to turn the argument on its head now. Besides, the visitors register at the office reception is maintained not by the Commission, but by an independent security company hired by the owner of the building. It is apparent that the applicants have not come to the Appellate Bench with clean hands.

8. Notwithstanding the grounds enumerated above for rejecting the applicants plea for restoration of appeal, this Bench may still be inclined to provide them an opportunity of presenting their case on merits. However, since the suit filed by the



applicants is still pending adjudication before the Hon'ble High Court, we feel it would not be appropriate to proceed in this matter. In any case, the counsel for the applicants has informed the Bench that the High Court has passed a stay order restraining the Commission and its officers, including this Appellate Bench from taking any action which may be construed as coercive. We therefore do not intend to adjudicate on the merits of the appeal till the time the suit is decided by the Sindh High Court or, is withdrawn by the applicants. This application is therefore dismissed. The applicants may file a fresh application after the suit is disposed off by the High Court.

(SHAHID GHAFAR)
Commissioner

(RASHID I. MALIK)
Commissioner

Announced in Islamabad on May _____, 2005